Supreme Court, U. S.
FILED
MAR 26 1980
MICHAEL RODAK, JR., CLERK

79-1504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS LABUS and MICHAEL SHUSTER,

Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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THOMAS LABUS and MICHAEL SHUSTER,

Petitioners,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Thomas Labus and Michael Shuster respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 26, 1980.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the District of Massachusetts is not reported and, also appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on February 26, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

1. Whether Congress, by including criminal sanctions as part of the statutory scheme of Title 7 of the United States Code (Commodities Future Trading Commission Act) intended to strip the government of its discretion to prosecute similar conduct which also falls within the purview of general mail and wire fraud sections of Title 18.

Statutory Provisions Involved

Commodities Future Trading Commission Act of 1974:

Section 2(a)(1)

> "That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title."

Section 6 o(1)

> "§ 60. Same; fraud; misrepresentation
>
> (1) It shall be unlawful for any commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (A) to employ any device, scheme, or artifice to defraud any client or participant; or
>
> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant."

Statement of the Case

From July 1, 1976 to January 15, 1978, Lloyd Carr and Company had engaged primarily in the business of offering and selling London commodity options to investors throughout the United States.

A "commodity futures" contract is different from a "commodity option" contract. The former is a contractual undertaking to buy or sell a fixed amount and grade of a certain commodity to be delivered at a future date. An option, on the other hand, confers upon the holder, upon the payment of a "premium", the contractual right to buy ("call option") or to sell ("put option") either a specified commodity or a commodity futures contract within a certain period of time at a given price (the "strike price"). *See British American Commodity Options Corp.* v. *Bagley,* 552 F.2d 482, 484-485 (2d Cir. 1977), *cert. denied,* 434 U.S. 938 (1977).

Alan Abraham was the chief executive officer of Lloyd Carr, and directed its operations and affairs in Boston. Thomas Labus was a vice-president of the Company, a member of the Board of Directors, and the director of research. Michael Shuster initially was a salesman for the Company and then the San Francisco branch manager.

On August 3, 1978, petitioners Thomas Labus and Michael Shuster were indicted with nine others in the United States District Court for the District of Massachusetts on charges of conspiracy to commit acts of mail and wire fraud in violation of Section 371 of Title 18, and substantive acts of mail and wire fraud in violation of Sections 1341 and 1343 of Title 18.

Prior to the trial, the petitioners filed a motion to dismiss the indictment "because exclusive jurisdiction for the

crimes alleged in the indictment was provided for in Title 7 of the United States Code". The District Court, conceding that the argument was "a clever one" nevertheless denied the motion. On January 15, 1979, the District Court also denied a motion for reconsideration of the motion to dismiss.

The essence of the government's proof at trial was that the defendants actively operated a boiler room [1] and used cold-canvass [2] techniques in attempting to sell London commodity options, and in so doing engaged in a fraudulent scheme to defraud their customers.

The government's case consisted primarily of the testimony of customers and prior employees of Lloyd Carr and Company. In addition, two tape recordings were introduced in evidence of conversations between customers of the Company and some of the defendants. Through the testimony of these witnesses, the government attempted to show that the defendants engaged in breaches of fair dealings with their customers, fraudulent profit predictions, misleading descriptions of the risk involved in the purchase of options, non-disclosure of the commissions

[1] A description of a "boiler room" operation was given by the District Court for the Southern District of Florida in *SEC* v. *R. J. Allen & Assoc., Inc.*, 386 F. Supp. 866, 874 (S.D. Fla. 1974):

"Boiler room" activity consists essentially of offering to customers securities of certain issuers in large volume by means of an intensive selling campaign through numerous salesmen by telephone or direct mail, without regard to the suitability to the needs of the customer, in such a manner as to induce a hasty decision to buy the security being offered without disclosure of the material facts about the (security).

[2] In a "cold canvass" campaign, the salesman solicits potential investors to whom he has not been recommended and with whom he has had no previous contacts. In essence, Lloyd Carr's business consisted of attempting to sell options to complete strangers who, prior to being contacted, had expressed no interest in purchasing such options.

charged by Lloyd Carr and other specific acts of fraud. Moreover, evidence was introduced concerning the various brochures mailed to prospective customers, which purported to describe the mechanics of option trading, the nature of Lloyd Carr's business, and the advantages of investing in whatever option was being promoted at the time. Furthermore, evidence was introduced concerning the hiring of salesmen without any knowledge of commodity matters and the instruction and training offered to the salesmen.

On the other hand, the defendants attempted to show that they acted in good faith, and that only Company president Alan Abrahams knew that the firm was defrauding investors.

The trial lasted for approximately five weeks. After almost three days of jury deliberation, Labus and Shuster were convicted of the conspiracy count and several counts of mail and wire fraud. Labus was sentenced to a term of three years imprisonment plus a five thousand dollar fine; Shuster was sentenced to a term of two years imprisonment.

The judgment of the District Court was affirmed by the Court of Appeals for the First Circuit. The Court of Appeals "agreed that Congress intended the CFTC to occupy the entire field of commodities futures regulation," but held that 7 U.S.C. § 6 o did not either preempt or impliedly repeal the mail and wire fraud sections of Title 18.

Reasons for Granting the Writ

1. The question presented concerns the construction and application of Title 7 to criminal acts, and is an important one of first impression under the statute.

The Commodity Futures Trading Commission Act of 1974 [3] included criminal sanctions specifically directed to the conduct charged here. These provisions clearly indicate that Congress intended them to be the only statute under which such conduct should be prosecuted if, in fact, the conduct also violates the mail and wire fraud section of Title 18.[4]

Section 7 U.S.C. 6 c(1) entitled, "Same; fraud; misrepresentation" states:

> "§§ 60. Same, fraud; misrepresentation
>
> (1) It shall be unlawful for any commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (A) to employ any device, scheme, or artifice to defraud any client or participant; or
>
> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant."

[3] Central to this statutory scheme was the exclusive jurisdiction provision in Section 2(a)(1) of the Act, which states:

> "That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is the character of, or is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title."

[4] Title 7 also provides criminal sanctions for other types of behavior. See, 7 U.S.C. §§ 6, 6a, 6b, 6c(a), 6c(b), 6c(e), 6d, 6e, 6h, 6i, 6k, 6m, 12b and 23.

Section 13 of 7 U.S.C. provides for the criminal penalties for violations of 7 U.S.C. 6o(1). Pursuant to this section, a violation of § 6o subjects an individual to a fine of not more than $100,000 and/or imprisonment of not more than one year, together with the costs of the prosecution.[5]

In connection with the criminal sanctions, Senator Talmadge in presenting the conference bill to the Senate noted the following:

> "To achieve its objectives, the Commission must have the authority to review and modify rules, regulations, and by-laws of exchanges. It must also be able to set uniform fitness standards for all persons engaged in futures trading activities and to accomplish the regulatory function. *The Commission must have an adequate and appropriate array of administrative and criminal penalties. Only through these measures can the integrity and adequacy of futures markets be assured to all parties.*
>
> In establishing this Commission, it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entitles—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the antitrust laws, nor for the Commodity Futures Trading Commission to usurp powers of other regulatory bodies such as those of the Federal Reserve in the area of banking or the Securities and Exchange Commission in the field of securities.
>
> The vesting in the Commission of the authority to have administrative law judges and apply a broad

[5] Section 13 c was amended as of October 1, 1978. Part of the amendment was to make it a felony for a violation of 6o(1).

spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeals process and the right of final determination by the courts are expressly preserved. (emphasis added)

120 Cong. Rec. 30458-30459, (Sept. 9, 1974).

Here, it is clear that 7 U.S.C. § 6o(1)(A) covers the identical subject matter of the mail and wire fraud statutes. The Congressional purpose, in enacting § 6o(1)(A), and other criminal statutes was to set up an exclusive comprehensive scheme for regulation of trading in commodity futures and options, and to provide the CFTC" with a "tremendous arsenal of jurisdictional reach and enforcement powers." *See, Lower, The Regulation of Commodity Option,* 5 Duke Law Journal 1095 (1978). As Senator Talmadge noted in presenting the conference bill:

> "The Commission must have an adequate and appropriate array of administrative and criminal penalties. *Only through these measures can the integrity and adequacy of future markets be assured to all parties.*" 120 Cong. Rec. 30458 (Sept. 9, 1974).

In the case of competing and overlapping statutes (as here), legislative intent is most reliably expressed in the statute where the attention to detail and to precision are the most manifest. *Posadas* v. *National City Bank,* 296 U.S. 497 (1936). Here, Congress provided for a specific remedy to be used against commodity trading advisors, obviously intending to exclude other several remedies, i.e., Title 18. Since, in this case, the legislative measure was given protracted consideration and debate (See U.S. Code Cong. and Adm. News p. 5843 et seq.), it is more likely that Congress by

enacting Section 6 o(1)(A) and other criminal sanctions intended to exclude all prosecution under Title 18.

Petitioners further contend that their argument is supported by the Futures Trading Act of 1978. Section 16 of the Act (7 U.S.C. § 13(a)(b) and (c)) increased the criminal penalties for violations of Title 7 and provided as follows:

> Section 16. Criminal penalties
>
> "Sections 16(1) and (2) increase the maximum fines from $100,000 to $500,000 for any future commission merchant, or an employee or agent of a futures commission merchant, convicted of embezzling, stealing, purloining, or criminally converting customers' property or any person convicted of manipulating or attempting to manipulate commodity prices.
>
> Section 16(3) amends section 9(b) of the Act to make it a felony, punishable by a fine of not more than $500,000 or imprisonment for not more than 5 years, or both, together with the costs of prosecution, to violate the provisions of the Act relating to (1) the requirement that futures transactions be executed only on or subject to the rules of designated contract market; (2) cheating, defrauding, deceiving, and bucketing in connection with futures transactions; (3) engaging in wash sales, fictitious transactions, and prohibited commodity option transactions; (4) perpetration of any fraud or deceit by commodity trading advisers or commodity pool operators; (5) the requirement that futures transactions be executed only through a member of a designated contract market; and (6) making false representations respecting the registration of such a contract market member as a futures commission merchant. Under existing law, the crimes are classified as misdemeanors and punishable by a fine of not more than

> $100,000 or imprisonment for not more than 1 year, or both.
>
> Section 16(4) provides that all violations of the Act or Commission regulations thereunder, not made felonies by section 9(a), (b), (d), and (e) of the Act, would be misdemeanors punishable by a fine of not more than $100,000 or imprisonment for not more than 1 year, or both, together with the costs of prosecution." See Pub. L. 95-405, 1978, 2091 and U.S. Code Cong. and Adm. News, p. 2126.

In addition, the Conference Committee also considered and adopted several other changes relating to criminal penalties, i.e., a scienter requirement was enacted for violations of the Act; the Act also made it a felony to knowingly violate the provisions of the Act relating to engaging in prohibited commodity option transactions and leverage transactions. See Pub. L. 95-405, 1978 U.S. Code Cong. and Adm. News, p. 2186-2187.

Hence, the intent of the Congressional design is clear—by establishing that a violation of 6 o(1) is a felony and making the penalty for a violation of the statute harsher than those of the mail and wire fraud sections of Title 18,[6] the government does not have the discretion to prosecute under either statute, but must charge under Title 7.

Moreover, the appellants' theory that they may only be charged with violations of Title 7 is not contrary to the existing case law. In *Edwards* v. *United States*, 312 U.S. 473, 484 (1949), the Supreme Court held that the Securities Act of 1933 which prohibits the fraudulent sale of securities by mail does not repeal by implication the provisions of the mail fraud statute so far as they cover securities.

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[6] The maximum penalty for a violation of Sections 1341 or 1343 is a term of imprisonment of five years or a $1,000 fine or both.

The Court explained:

> "Petitioner's objection to these counts is that a later act, the Securities Act of 1933, makes it unlawful to use the mails to defraud by the sale of securities. His argument is that in so far as the later act prohibits the fraudulent sale of securities by mail, it repeals by implication the provisions of the old mail fraud statute in so far as they cover securities. We see no basis for a conclusion that Congress intended to repeal the earlier statute. The two can exist and be useful, side by side."

Here, unlike the congressional intent for the Securities Act of 1933, it has been demonstrated that Congress conclusively intended the CFTC to be the sole regulatory authority for the commodities industry and that charges of criminal violations were to be pursuant to Title 7 of the United States Code.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

BARRY M. FALLICK
KENNETH J. PLATZER
Attorneys for Petitioners

APPENDIX

Opinion of the United States Court of Appeals For the First Circuit

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No. 79-1164

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES A. BRIEN,

Defendant-Appellant.

No. 79-1165

UNITED STATES OF AMERICA,

Appellee,

v.

THOMAS LABUS,

Defendant-Appellant.

No. 79-1166

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT RALPH ZOLLA,

Defendant-Appellant.

No. 79-1167

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL SHUSTER,

Defendant-Appellant.

No. 79-1168

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN BUZZI,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. FRANK H. FREEDMAN, *U. S. District Judge*]

Before
CAMPBELL and BOWNES, *Circuit Judges,*
BONSAL,* *Senior District Judge.*

Daniel J. Kornstein for appellant, James D. Brien.

Barry M. Fallick, with whom *Platzer and Fallick* was on brief, for appellants, Thomas Labus and Michael Shuster.

Andrew Good, by appointment of the Court, for appellant, Robert Ralph Zolla.

Walter Munsen, with whom *Jessica deKoninck* and *de Koninck and Munsen* were on brief, for appellant, Stephen Buzzi.

Michael A. Collora, Assistant United States Attorney, with whom *Edward F. Harrington,* United States Attorney, was on brief, for appellee.

February 26, 1980

BOWNES, *Circuit Judge.* Defendants-appellants James Brien, Thomas Labus, Michael Shuster, and Robert Ralph

* Of the Southern District of New York, sitting by designation.

Zolla, all former management employees of Lloyd, Carr & Company, appeal their convictions for conspiring[1] to commit mail[2] and wire[3] fraud in the sale of futures con-

[1] Conspiracy to violate federal law is prohibited by 18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[2] Use of the mails in furtherance of any scheme to defraud is prohibited by 18 U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] Use of interstate wire communications in furtherance of any scheme to defraud is prohibited by 18 U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

tracts in commodities traded on markets in London, England. The appellants are joined by Stephen Buzzi, a former Lloyd, Carr & Company salesman, in appeals of convictions for the commission of mail and wire fraud in the sale of London commodity options. We affirm all convictions.

There are five issues on appeal: (1) the validity of the search of a business premises and the seizure of business records; (2) whether the Commodities Futures Trading Act (CFTA) preempts or impliedly repeals the general mail and wire fraud statutes; (3) the correctness of the jury instructions; (4) a variance as to one count in the indictment; and (5) whether preindictment publicity was so prejudicial as to require dismissal of the indictment.

The Facts

Lloyd, Carr & Company (Lloyd, Carr) was founded in 1976 by Alan Abrahams, a/k/a James Carr, to sell London commodity options[4] to investors in the United States. Abrahams hired each of the defendants during 1976. All but Buzzi eventually assumed management positions with Lloyd, Carr. Thomas Labus, hired to head Lloyd, Carr's research department, also assumed responsibility for training new salesmen and served on Lloyd, Carr's Board of Directors. James Brien progressed from salesman to national sales manager and a member of the Board of Directors. Robert Ralph Zolla rose from salesman to sales floor

[4] The purchaser of a commodity option obtains the right to buy or sell a futures contract in a specific commodity at a fixed price for a fixed period of time. Purchase of the option is, in effect, a wager that the market value of the specified commodity will rise higher during the fixed option period than the fixed price of the option, thereby allowing the option holder to buy and sell the futures contract at a profit. For the holder to make a profit, the market price of the commodity must rise higher than the sum of the contract price, the option price (the premium) and any transactions costs, including brokerage commissions.

supervisor of the Boston office, Lloyd, Carr's principal and largest office. Michael Shuster, originally hired as a salesman in Lloyd, Carr's Greenwich, Connecticut, office, became assistant manager of that office, and then manager of Lloyd, Carr's San Francisco office.

Lloyd, Carr sold commodity options through the use of "boiler room"[5] sales operations. Salesmen, attracted to Lloyd, Carr by advertisements containing inflated estimates of their commissions and other benefits, were hired without regard to their knowledge of the commodities market. Once hired, salesmen were trained for a few days in telephone sales techniques and the subtleties of selling commodities options. They were then given a desk and a phone in a large room filled with other salesmen, and instructed to call persons whose names were obtained from Dun & Bradstreet investor lists. The prospects were called "cold" and exhorted to purchase commodity options from Lloyd, Carr. Lloyd, Carr salesmen were required to make at least one hundred calls per day, which resulted on the average in one or two sales. During one month, more than 155,000 long distance calls were made from Lloyd, Carr's Boston office. Sales commissions ranged from eight to fifteen percent of the option price. Turnover in salesmen was high.

To assist its salesmen, Lloyd, Carr provided them with scripts of "canned" sales pitches for the initial or "set up"

[5] A "boiler room" sales operation was concisely described in *S.E.C.* v. *R. J. Allen Associates, Inc.*, 386 F.Supp. 866, 784 (S.D. Fla. 1974):

> "Boiler room" activity consists essentially of offering to customers securities of certain issuers in large volume by means of an intensive selling campaign through numerous salesmen by telephone or direct mail, without regard to the suitability to the needs of the customer, in such a manner as to induce a hasty decision to buy the security being offered without disclosure of the material facts about the issuer.

call and follow-up calls. The purposes of the "set up" call were to "qualify" the investor by determining the extent of his interest and financial resources and to stimulate his interest in London commodity options. Interest was aroused by making false, deceptive and misleading statements about the likelihood of large increases in the price of particular commodities, about the actual cost of dealing in commodity options, and by misrepresenting important facts concerning Lloyd, Carr's method of operations. Salesmen often claimed that Lloyd, Carr's market predictions were the product of a research department with a budget of one million dollars per year; in fact, a few part-time employees staffed the research department. Salesmen told investors that sales commissions were only ten to fifteen percent of the option price; in fact, while salesmen earned only that amount, Lloyd, Carr marked up the price of options in amounts ranging from seventy-two to five hundred percent of the market price and concealed that from investors. Salesmen informed investors orally and in writing that their funds would be placed in "customer segregated accounts" immune from attachment; in fact, no such accounts existed and Lloyd, Carr accounts were attached with increasing frequency as its legal difficulties mounted. Salesmen assured investors that options would be purchased on the day of the order; in fact, many options were not purchased until days or weeks after the order, thereby depriving investors of gains to be made in a rising market. Investors were frequently told that purchases had been made when they had not, and were denied the right to cancel orders on that basis. Although investors were told that their profits would be returned to them within forty-eight hours, many were forced to sue to obtain their profits.

Most importantly, Lloyd, Carr deceived investors as to how a profit could be made in commodity options. It repeatedly informed investors that they would realize a profit for every increase in the price of the commodity underlying the option. In fact, no profit could be realized until increases in the market price of the commodity also covered the cost of the purchase of the option. The cost of the purchase of the option included brokers' fees in addition to Lloyd, Carr's huge premiums. Lloyd, Carr often represented that its option prices were lower than its competitors; in fact, its enormous markups resulted in option prices three or four times larger than those of its competitors. Finally, despite the fact that Lloyd, Carr's pricing mechanisms increased the risk of the purchase of a type of option already generally recognized as risky, Lloyd, Carr told investors that commodity options presented only a limited investment risk.

After the "set up" all, salesmen sent investors a mailing containing various pamphlets and sales literature. This material included false, deceptive, and misleading statements similar to those made in the "set up" call. A steady barrage of follow-up calls to qualified investors followed the mailing, which continued the established pattern of false, deceptive, and misleading statements and injected a new component: high pressure salesmanship. In these calls, salesmen focused on the natural uncertainties of investors; the low risk, the huge return and Lloyd, Carr's record of success were emphasized in the context of the urgent need to invest immediately. Investors were also told that eighty-two percent of Lloyd, Carr's previous customers made money. In fact, nearly that percentage lost all of their investment. Often, when an investor hesitated, a second salesman was called to the phone to pose as an "expert" in the particular commodity and to corroborate the first salesman's claims.

Testimony at trial showed that this was the standard method of operation. The evidence also showed that the management of Lloyd, Carr intentionally created a pressurized "circus-like" atmosphere in which unusual and bizarre efforts to make sales became commonplace. Sales managers established quotas and fired those who failed to meet them. Prizes, including money, mopeds, and appliances were used to stimulate performance. Cash bonuses were paid to those who stood on their desks or removed their shoes, socks, ties, shirts or blouses while consummating a sale. Sales managers sometimes dressed in gorilla suits or drove mopeds around the floor to energize the sales force. Sales were celebrated by the ringing of gongs and cowbells and by cheering from the sales force. Fear, too, played a role. Firings were frequent and capricious. During one slow sales period, the names of salespersons were placed on slips of paper in a hat. Persons whose names were drawn from the hat were fired on the spot.

It is not surprising that the investors lost heavily. By December of 1977, eleven hundred persons had purchased London commodity options through Lloyd, Carr.[6] Only thirty-three persons, three percent of all investors, made a profit on their investments. Approximately fourteen percent of all investors lost part of their investments. Eighty-three percent of Lloyd, Carr's investors lost everything.

State and federal legal action began in January of 1978. Several of these actions are relevant to this case. After

[6] Examples of the investment involved in commodity options purchased through Lloyd, Carr are as follows:

Commodity	*Unit of Sale*	*Option Price*
Sugar	50 metric tons	$11,000
Coffee	5 metric tons	14,000
Copper	25 metric tons	5,300

receiving numerous complaints from persons solicited by Lloyd Carr, the Attorney General of the State of Michigan sought a preliminary injunction in state court. Lloyd, Carr removed the case to federal court and the Commodities Future Trading Commission (CFTC), the federal agency vested with exclusive jurisdiction over trading in commodity futures, intervened as a party plaintiff. On December 5, 1977, Chief Judge Noel Fox of the United States District Court for the Western District of Michigan granted the preliminary injunction, finding that Lloyd, Carr had committed "a number of egregious, inexcusable violations of federal law" and that it was engaged in "inherently fraudulent activity." *Kelley* v. *Carr,* 442 F. Supp. 376 (W.D. Mich. 1978). This order enjoined Lloyd, Carr's fraudulent and deceitful activity, as well as the destruction or disposition of any "business related property."

Judge Fox further ordered compliance with Rule 32.7(e) of the CFTC, requiring production for inspection of records maintained pursuant to federal law. *See* 17 C.F.R. § 32.7(e) (1977).[7]

[7] 17 C.F.R. § 32.7 (1977) required, *inter alia,* the following:

(a) Each person which accepts any money, securities or property (or extends credit in lieu thereof) from an option customer as payment of the purchase price in connection with a commodity option transaction shall keep full, complete and systematic records together with all pertinent data and memoranda of or relating to such transactions. Such records shall at least include all orders (filled, unfilled or cancelled), signature cards, books of records, journals, ledgers, cancelled checks, copies of all statements of purchase, exercise or lapse, and reports, letters, disclosure statements and confirmation statements required by § 32.5 of this Part, solicitation or advertising material (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations), circulars, memoranda, publications, writings, and all other literature or written advice distributed to option customers or prospective option customers.

In the meantime, the Securities Division of the Office of the Secretary of State of Massachusetts had initiated its own investigation in response to more than one hundred seventy complaints received from persons solicited by Lloyd, Carr. On December 21, 1977, an employee of the Securities Division observed papers and materials being discarded from Lloyd, Carr's office at 84 State Street in Boston. The abandoned materials were confiscated and subsequently found to include records Lloyd, Carr was required to maintain by both CFTC Rule 32.7(e) and Judge Fox' order. The next morning, John M. Hurley, counsel for the Securities Division, served a subpoena duces tecum for a variety of business records on Lloyd, Carr and many of its employees.

On January 9, 1978, Chief Judge Fox found probable cause to believe that several persons, including defendants Brien, Shuster, and Zolla, who worked at Lloyd, Carr's Boston office, had violated the injunction of December 5 and ordered them to show cause why they should not be held in criminal contempt. *United States* v. *Carr,* Crim. Cont. No. G78-2 C.A. (W.D. Mich. Jan. 9, 1978).

On January 10, 1978, a Lloyd, Carr investor informed Raymond Cocchi, Director of the Massachusetts Securities Division, that he had called Lloyd, Carr's Boston office and had been told that all account executives had been transferred to Atlanta, Georgia. Later that day, Hurley swore out an affidavit setting forth this and other relevant facts obtained during the Securities Division's investigation of Lloyd, Carr.

On January 11, 1978, Robert Boraks, Special Trial Counsel for the CFCT, swore out an affidavit detailing his knowledge of Lloyd, Carr's operations. Boraks' knowledge was obtained during the CFTC's intervention before Judge Fox, from interviews with Lloyd, Carr clients and em-

ployees, and from examination of CFTC files on Lloyd, Carr. The opinion and orders of Judge Fox in *Kelley* v. *Carr, supra,* and *United States* v. *Carr, supra,* were appended to Boraks' affidavit, as were several affidavits selected at random from those submitted to Judge Fox in *Kelley* v. *Carr.* The Boraks and Hurley affidavits were presented to the United States Magistrate as an Affidavit for Search Warrant later that day in Boston. The magistrate authorized a search and seizure of eight categories of Lloyd, Carr's books and records from its office at 84 State Street, Boston, including many of those required by federal law to be maintained. Execution of the warrant by F.B.I. agents resulted in the seizure of most of Lloyd, Carr's books and records and the curtailment of its Boston operations.

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II. *Preemption and Implied Repeal*

We deal next with the contention that appellants' convictions should be set aside because the general mail and wire fraud statutes under which the convictions were obtained were either preempted or impliedly repealed by the enactment of the more specific antifraud provisions of the Commodities Futures Trading Act.[12]

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[12] Fraud in the sale of trading of commodities futures is prohibited by 7 U.S.C. § 6O:

> (1) It shall be unlawful for any commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (A) to employ any devise, scheme, or artifice to defraud any client or participant or prospective client or participant; or
>
> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

Appellants' argument rests primarily on the exclusive jurisdiction provisions of Section 2(a)(1) of the CFTA:

> *Provided,* That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty" or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title[.]

17 U.S.C. § 2 (1978).

They also point to supporting language in the Conference Report on the 1974 Amendments to the CFTA. *See* H. Conf. Rep. No. 93-1383, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843.

Although we agree that Congress intended the CFTC to occupy the entire field of commodities futures regulation, we see two reasons why that conclusion is of little help to appellants.

Assuming, *arguendo,* that appellants' acts violated both 7 U.S.C. §6O and 18 U.S.C. §§ 1341 or 1343,[13] we find no

[13] The district court found, *inter alia,* that the actions of appellants did "not appear to constitute violations of 7 U.S.C. § 13b" because the government never alleged that appellants "mailed or wired reports containing misleading crop or market information or conditions affecting commodity prices" as prohibited by section 13b. The district court failed, however, to consider whether the acts violated 7 U.S.C. § 6O, the more pertinent provision of the CFTA. *See* note 12, supra. In light of our other conclusions in regard to the issues of preemption and implied repeal, we find this to be harmless error. Fed.R.Crim.P. 52(a).

basis for a conclusion that the former either preempted or impliedly repealed the latter. It was the fraudulent scheme furthered by use of the mails and interstate telephone calls that brought appellants within the purview of the mail and wire fraud statutes and not the sale of commodity options. While courts have held that the CFTA preempts state regulation of commodities futures, *Clayton Brokerage Co. of St. Louis, Inc.* v. *Mouer,* 520 S.W.2d 802 (Tex. Civ. App. 1975), it has also been held that the CFTA does not preempt state general antifraud statutes. *People of New York* v. *Monex Int'l, Ltd.,* 86 Misc.2d 320, 380 N.Y.S.2d 504 (1976). By the same analysis, since 18 U.S.C. §§ 1341 and 1343 are federal general antifraud statutes, they cannot be preempted by the CFTA.

Moreover, in urging a finding of implied repeal, appellants march into the teeth of a strong judicial policy disfavoring the implied repeal of statutes. *See United States* v. *Borden,* 308 U.S. 188, 198 (1939). For a court to find implied repeal, there must be a positive repugnancy between the two statutes. *Posados* v. *National City Bank,* 296 U.S. 497, 504 (1936); *Wood* v. *United States,* 41 U.S. (16 Peters) 341, 362-63 (1842). Where two statutes cover the same subject, effect will be given to both, if possible. *Posados* v. *United States, supra.* Partial repeals will not be implied because they do not satisfy the requirement that the intent of the legislative body be clear and unequivocal. *Id.* It is also generally held that for a later-enacted statute to impliedly repeal an earlier one, the later statute must cover the entire field occupied by the earlier one. *United States* v. *Tynen,* 78 U.S. (11 Wall.) 88 (1870); *United States* v. *Montgomery,* 21 F. Supp. 770, 771 (D.N.M. 1938). The CFTA, which prohibits only interstate communications in commodities fraud, obviously does not cover the entire ground occupied by 18 U.S.C. §§ 1341 and 1343,

which apply to mail or interstate wire communications in furtherance of *any* scheme to defraud. There can be no finding of implied repeal in these circumstances. *Cf. Edwards* v. *United States,* 312 U.S. 473, 484 (1941) (the Securities Act does not operate as an implied repeal of the mail fraud statutes); *Smith* v. *Groover,* 468 F. Supp. 105 (N.D. Ill. 1979) (CFTA does not impliedly repeal the federal antitrust laws); *R. J. Herely & Son Co.* v. *Stotler & Co.,* 466 F. Supp. 345 (N.D. Ill. 1979) (congressional grant of exclusive jurisdiction to the CFTC was not intended to eliminate existing private remedies).

Although the statutes prohibit similar conduct, they operate independently and harmoniously. The government's election to prosecute appellants under the statute which, at the time, provided the more severe penalty,[14] was an exercise of discretion that violated no rights of appellants. *United States* v. *Batchelder,* 47 U.S.L.W. 4611, 4614 (June 4, 1979).

[14] At the time of appellants' indictment, Section 13(c) of the CFTA made violation of Section 6O of the CFTA punishable by a fine of up to $100,000 and/or imprisonment of not more than one year.

Opinion of United States District Court District of Massachusetts

Criminal No. 78-327-F

UNITED STATES OF AMERICA

v.

ALAN HERBERT ABRAHAMS, a/k/a James A. Carr, JAMES A. BRIEN, JOHN J. COSULICH, THOMAS LABUS ROBERT RALPH ZOLLA, MICHAEL SHUSTER, CURTIS BECK, IRA TODD KLEIN, FRANCIS R. H. NICHOLS, CHARLES ANDERSON WATHEN, FRANK POST and STEPHEN BUZZI

MEMORANDUM

December 29, 1978

FREEDMAN, *D.J.*

The defendants' argument that dismissal is required because exclusive jurisdiction for the crimes alleged in the indictment is provided for in Title 7 of the United States Code is a clever one. The defendants rely on 7 U.S.C. § 2, which vests the Commodities Futures Trading Commission ("CFTC") with "exclusive jurisdiction" with respect to transactions involving contracts for sale of a commodity for future delivery, and 7 U.S.C. § 13(b), which prohibits, *inter alia,* the dissemination by mail or wire of ". . . false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce. . . ." They argue that, read together, 7 U.S.C. § 2 and 7 U.S.C. § 13(b), because of the "exclusive jurisdiction"

of the CFTC, bar prosecution for mail or wire fraud under 18 U.S.C. §§ 1341, 1343, where transactions involving the sale of commodities futures or options are involved.

Without yielding to the temptation to delve deeply into the interplay between the commodities fraud, securities fraud and mail and wire fraud statutes, I reject the defendants' argument. First, the Supreme Court has held that 15 U.S.C. § 77 q(a), the fraud provision of the Securities Act of 1933, does not repeal by implication the mail fraud statute. "The two," said Mr. Justice Reed, "can exist and be useful, side by side." *Edwards* v. *United States,* 312 U.S. 473 at 484 (1941) (footnote omitted). *See United States* v. *Tallant,* 547 F.2d 1291 at 1299 (5th Cir.), *cert. denied,* 434 U.S. 889 (1977). I believe that 7 U.S.C. § 13(b) and 18 U.S.C. §§ 1341, 1343 can also exist together, "side by side." Second, the instant indictment charges the mailing and wiring, in furtherance of a scheme, of such things as purchase confirmation, checks, account cards and orders to purchase. Nowhere is it alleged that the defendants mailed or wired reports containing misleading crop or market information or conditions affecting commodity prices. The acts charged, therefore, do not appear to constitute violations of 7 U.S.C. § 13(b). They do, however, constitute violations of 18 U.S.C. §§ 1341, 1343, which prohibit the use of the mails or wires in the execution of a scheme or artifice to defraud. *Cf. United States* v. *Maze,* 414 U.S. 395 (1974).

AN APPROPRIATE ORDER SHALL ISSUE.

FRANK H. FREEDMAN
United States District Judge